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ABSTRACT

This fourth chapter of "The Yearbook of School Law, 1986" summarizes and analyzes state and federal court decisions handed down in 1985 related to handicapped students, and to the conditions affecting them and, to a lesser extent, school personnel. Among the topics addressed are the procedural safeguards established to ensure appropriate identification, evaluation, and placement of handicapped children; the placement of children in the least restrictive environment and in private facilities; the availability of related services for those in special education; and discipline policies affecting the handicapped. Other topics examined are remedies granted by the courts for institutions failures to provide appropriate services; the application of Eleventh Amendment guarantees of governmental immunity in cases relating to the enforcement of laws affecting the handicapped; cases involving state laws; and cases involving discrimination against handicapped students or school personnel under Section 504 of the Rehabilitation Act. (PGD)

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INTRODUCTION

Litigation involving handicapped children remained at a significant level in 1985, but the decline in cases noted in 1984 continued. Congressional approval of pending legislation to permit the award of attorney fees may again encourage increased litigation. While the Supreme Court's decision in *Smith v. Robinson* severely limited parents' ability to recover attorney fees, this was still the most frequently litigated issue.[1]

1. 104 S. Ct. 3457 (1984).

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The most significant litigation in 1985 involved reimbursement of parents for unilateral placement of handicapped children in private facilities. Most lower courts have held that tuition payments can only be made if exceptional circumstances exist. The United States Supreme Court, however, ruled that such relief is appropriate.[2] Even violation of the "stay put" requirement does not negate the claim if it is later determined that the board's proposed program is inappropriate and the private placement is appropriate.

Other noteworthy cases related to eleventh amendment immunity, stringent state standards, discipline, and contagious diseases.

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the Education of the Handicapped Act (EHA) to ensure appropriate identification, evaluation, and placement of handicapped children. Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. The judiciary has been called upon frequently to interpret specific procedural rights and to assess school officials' compliance.

Evaluation

Prior to placement of a handicapped child in a special education program, EHA requires a full evaluation. The New Jersey Federal District Court held that a school district's proposed individualized education program (IEP) could be rejected solely on the ground that the district failed to comply with mandated evaluation procedures.[3] In the case under review, the most serious procedural violation was the methodology used to formulate a program recommendation. Conclusions were based upon simple observations; no validated instrument was used to test the child's aptitude; tests focused only on a narrow range of behaviors; procedures tended to be biased against deaf children; and no member of the evaluation team was an expert in the education of hearing impaired children.

2. Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996 (1985).
3. Bonadonna v. Cooperman, 619 F. Supp. 401 (D.N.J. 1985).

Change in Placement

Extensive procedural safeguards surround any change in a child's placement. During these due process proceedings, two questions often arise: Which party bears the burden of proof when a program is challenged as inappropriate? Under what conditions can a child's placement be altered during the review process?

Burden of Proof. A Georgia federal district court ruled, in advance of trial, on which party bears the burden of proof in court when a state education agency decision regarding a change in placement is challenged.[4] Based on the importance attributed to administrative review under EHA, the court held that the burden of proof is on the individual attacking the state decision. In this case, the burden fell on the parents who were protesting the district's change in their child's placement. Although the district was altering the placement, at trial the parents must establish that the proposed program does not provide their child with an appropriate education since the district's decision was supported by the state agency.

Placement During Due Process Proceedings. Numerous legal challenges have involved section 1415(e)(3) of EHA, often referred to as the "stay put" or "status quo" provision. The section provides that "[d]uring the pendency of any proceedings conducted pursuant to [section 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child." Until 1985, most federal courts held that the stay put provision barred reimbursement to parents for unilateral private placements during pendency of due process proceedings. The Supreme Court in *Burlington School Committee v. Department of Education*, however, held that tuition costs could be recovered by parents if it were later determined that the private placement was appropriate and the public school placement was inappropriate.[5]

The purpose of maintaining the current placement is to provide stability and continuity in a child's educational program. In a New York case, the school board and parents disagreed as to what consti-

4. Tracey T. v. McDaniel, 610 F. Supp. 947 (N.D. Ga. 1985).

5. 105 S. Ct. 1996, 2004 (1985). *See* discussion under Private Facilities in this chapter.

tuted the "current placement."[6] Because of inordinate delays in placing handicapped children in the city of New York, a federal district court judge in 1982 issued an order authorizing parents to enroll their children in private schools at the district's expense if placement was not made within sixty days of the request for review. In the 1985 case, after a parent had enrolled her child in a private school, the school board recommended placement in a public school class for emotionally handicapped children. The parent disagreed and requested an impartial hearing. Although the public school placement was eventually determined to be appropriate, the commissioner of education found the school board liable for tuition costs during the review process since the private placement was the "current placement." The board sought reversal of the tuition liability. The federal district court affirmed the commissioner's ruling, concluding that the current placement was the placement prior to and during the review. Current placement was not the board's proffered public school program.

The Fifth Circuit Court of Appeals held that school officials could change a student's placement without parental consent during an IEP appeal if the student posed a danger to himself or others, or threatened disruption of the educational environment.[7] Relying upon EHA regulations, the court reasoned that normal disciplinary procedures could be used where a threat of danger existed.[8]

Exhaustion of Administrative Remedies

Courts continue to insist that administrative review procedures must be exhausted prior to judicial review.[9] A New York federal district court held that review is mandatory even though it may appear to be futile.[10] Under New York's administrative review process, parents have the right to appeal the local review committee's decision to the board of education, which then appoints a hearing officer. If not satisfied, the parent must appeal to the commissioner of education prior to seeking judicial review. In a 1985 case, the parent and local committee on handicapped were in complete agreement on a child's need for

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6. Board of Educ. of N.Y. v. Ambach, 612 F. Supp. 230 (E.D.N.Y. 1985).
7. Jackson v. Franklin County School Bd., 765 F.2d 535 (5th Cir. 1985).
8. *See* 45 C.F.R. § 300.513.
9. *See* Robideau v. South Colonie Cent. School Dist., 487 N.Y.S.2d 696 (N.Y. App. Div. 1985).
10. Antkowiak v. Ambach, 621 F. Supp. 975 (W.D.N.Y. 1985).

private residential placement. The only facility that had space available, however, had been removed from the state list of approved schools. The father resorted to legal action to compel placement of the child and reimbursement for expenses. Because there was no disagreement as to placement, the father argued that the administrative process was not applicable. He further maintained that the commissioner's decision was predetermined since he would not approve placements in an unapproved school. The court declined to support an exception to the exhaustion requirement and noted that no formal decision had been rendered and the commissioner, in view of nine schools rejecting the child, might have considered placement in an unapproved school.

Another New York federal district court, however, did recognize an exception to the requirement to exhaust administrative remedies.[11] In this case, plaintiffs challenged the adequacy of federal policies and procedures instituted at a juvenile center. Since the adequacy of the administrative remedies was coextensive with the overall question raised as to adequacy of procedures, the court held that exhaustion was not required. The District of Columbia District Court also recognized an exception when evidence clearly showed that further resort to administrative proceedings would be unproductive.[12] The school system had not communicated with the parents, failed to justify its decision, and had not complied with the directives of the hearing officer.

In a Maryland case, parents of a handicapped child injured in a regular physical education class brought suit claiming that the child was negligently placed without special safeguards.[13] The IEP developed for the school year by the school and parents denoted regular placement. Rejecting the parents' complaint, the state appellate court concluded that,

> [a]dministrative procedures have been set in place and must be followed prior to resort to legal process. Once the IEP was formulated and agreed to by the parents without protest or revision, the propriety of that placement decision was not challengeable in a court of law.[14]

As the court pointed out, the parents could seek damages for injuries if alleged to result from negligent conduct (i.e., if the teacher or board failed to exercise reasonable care to protect the student).

11. Andre H. v. Ambach, 104 F.R.D. 606 (S.D.N.Y. 1985).
12. Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985).
13. Alban v. Board of Educ. of Harford County, 494 A.2d 745 (Md. 1985).
14. *Id.* at 747.

PLACEMENT

Least Restrictive Environment

Least restrictive environment (LRE) refers to section 1412(5) of the EHA and indicates in part that "to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped." Although the judiciary has interpreted the provision to indicate a strong congressional preference for mainstreaming, a Missouri federal district court ruled in 1984 that the state's system of separate schools for severely handicapped does not per se violate EHA.[15] On appeal, the Eighth Circuit Court of Appeals affirmed the district court decision, declining to rule on the question presented by plaintiffs because of a shift in theory from the position at trial.[16] Rather than presenting the original question of whether the state may operate separate schools serving only severely handicapped, the plaintiffs posed the issue of whether an LRE placement is available to each child who might benefit from the placement.

Only one other case addressed mainstreaming in 1985. The New Jersey Federal District Court reviewed an appeal from a decision of the New Jersey Office of Administrative Law concerning the placement of an auditorially handicapped child.[17] The parents requested continued placement of the child in a regular educational environment with supplementary aids and services while the school board argued that placement in a school for the hearing impaired was needed. Based on the child's substantial progress in kindergarten and first grade, the court reasoned that the existing placement in a regular classroom was "almost ideal." The child was clearly benefiting from the instruction (learning in some areas was equivalent to peers) and showed improved social adjustment. The court in discussing the existing placement noted: "while it does not eliminate stigma, it lessens it by maximizing mainstreaming; while it may sacrifice some educational quality for social values, it provides expert instruction in those substantive areas most crucial to [the child's] intellectual development."[18] Aside from the educational justification for mainstreaming,

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15. St. Louis Developmental Disabilities Treatment Center Parents' Ass'n v. Mallory, 591 F. Supp. 1416 (W.D. Mo. 1984). *See* The Yearbook of School Law 1985 at 82.

16. St. Louis Developmental Disabilities Treatment Center Parents' Ass'n v. Mallory, 767 F.2d 518 (8th Cir. 1985).

17. Bonadonna v. Cooperman, 619 F. Supp. 401 (D.N.J. 1985).

18. *Id.* at 415.

the court also found that the board's procedural violations in evaluation warranted rejection of its proposed program.[19]

Private Facilities

One of the most frequently litigated areas under EHA is who must pay the cost of educating a handicapped child in a private facility. The federal law places the responsibility on public school districts only if an appropriate public placement is unavailable. If parents select a private placement when an appropriate public one is available, they must bear the cost. Difficult questions arise, however, when parents and school systems disagree as to what is an appropriate placement, and parents unilaterally place their children in private schools prior to the exhaustion of the review process. If the private placement is later determined to be appropriate, parents may seek recovery of tuition costs. School systems, however, have maintained that violation of the "status quo" (removal of the child from the current educational placement) forecloses the reimbursement of private costs. Most courts have agreed that violation of this provision prevents recovery of costs unless exceptional circumstances exist. Such circumstances have included (1) current placement poses a danger to a child's health, (2) school system acted in bad faith by failing to provide procedural safeguards, and (3) school system failed to provide private placement when warranted.[20] In 1985, the Supreme Court addressed this controversy in *Burlington School Committee v. Department of Education*.[21]

In *Burlington*, the father disagreed with the school district's proposed educational placement of his learning disabled child, and, after seeking an independent evaluation from medical experts, enrolled the child in a private school. The state's Bureau of Special Education Appeals (BSEA) later held that the district's placement was inappropriate and ordered the district to pay the private tuition costs and reimburse the parent's earlier costs. The district refused to fund the private placement and filed suit in federal court. After several stages of judicial review,[22] the district court found the school system's proposed program to be the appropriate placement. The First Circuit Court of Appeals, however, remanded the case, finding that the "district court erred in conducting a full trial *de novo*, that it gave insufficient

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19. *See* discussion under Procedural Safeguards in this chapter.

20. *See* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Department of Educ. v. Katherine, 727 F.2d 809 (9th Cir. 1983).

21. 105 S. Ct. 1996 (1985).

22. *See* The Yearbook of School Law 1985 at 76.

weight to the BSEA findings, and that in other respects it did not properly evaluate the IEP."[23] The school district petitioned the Supreme Court for a *writ of certiorari*.

Two issues were addressed by the Supreme Court: (1) whether potential relief under section 1415(e)(2) includes reimbursement for private education costs, and (2) whether removal of a child from the current educational placement without the consent of school officials constitutes a waiver of reimbursement.

Section 1415(e)(2) provides that in the judicial review of a controversy "the court . . . shall grant such relief [it] determines is appropriate." The Supreme Court concluded that this "confers broad discretion on the court" and would include reimbursement for private school expenses if the placement is determined to be the proper placement.[24] The Court found such relief to be appropriate and necessary, because the review process can be lengthy (this controversy extended over eight years), and reasoned that children should not be educationally disadvantaged by an inappropriate placement nor should parents be economically disadvantaged by removing their children from such placements. In rejecting the school board's argument that reimbursement represented "damages," the Court noted that reimbursement simply required the school "to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[25]

The Court also rejected the school district's argument that a change in placement without the district's consent under section 1415(e)(3) waived all rights to reimbursement. In the Court's opinion, denying relief would defeat the major objective of the EHA of providing a free appropriate education. One caveat, however, was issued by the Court: parents who unilaterally seek private placement do so at their own financial risk. If the public school placement is found to be proper, reimbursement would be barred.

In the wake of *Burlington*, several lower courts addressed the issue of whether public school placements were inappropriate, thereby justifying reimbursement for private placements. Both the Fourth Circuit Court of Appeals and the District of Columbia Court of Appeals found that schools had failed to provide appropriate educational placements. In the Fourth Circuit case, the school board argued that

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23. Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996, 2001 (1985).

24. *Id.* at 2003.

25. *Id.*

reimbursement should be granted only if the change in placement occurred during the pendency of review proceedings.[26] The court, however, declined to impose this restriction, noting that the board had not fulfilled its duty to inform the parents of their procedural rights. The District of Columbia appellate court held that a residential placement was necessary for both the educational and emotional needs of a student.[27] Furthermore, there was no evidence that the school district's IEP was formulated with careful consideration of the student's individual, unique needs nor that the district had complied with federal procedural requirements.

The Tenth Circuit Court of Appeals confirmed a district court's finding that the defendant school district had offered the plaintiff student a free appropriate education.[28] The school and the parents agreed that the student's placement should be changed, but the parents rejected the special individual multihandicapped public school program proposed by the district and placed their child in a private facility. According to the court, the school had complied with all procedures set forth in the handicapped act and had designed a program that was "reasonably calculated to enable the child to receive educational benefits."[29] While the court recognized that the private placement was superior, it reiterated the Supreme Court's interpretation in *Board of Education v. Rowley* that the EHA does not require an education that maximizes a child's potential.[30] Similarly, the Rhode Island Federal District Court found a school's proposed placement adequate, thus preventing the parents from recovering reimbursement for private education.[31]

Prior to the *Burlington* decision, a California appellate court relaxed the "stay put" requirement in assessing reimbursement for private tuition. The court found unilateral placement justified in the context of a "manifestly inappropriate" placement and prolonged inaction on the part of the school district to remedy the placement.[32]

In addition to the issue of tuition reimbursement, several cases in 1985 addressed private placements in the context of state law mandates that exceed federal standards.[33] The Third Circuit Court of Appeals confirmed a New Jersey district court's finding that continued

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26. Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633 n.4 (4th Cir. 1985).
27. McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985).
28. Cain v. Yukon Pub. Schools, Dist. I-27, 775 F.2d 15 (10th Cir. 1985).
29. *Id.* at 19.
30. 458 U.S. 176 (1982).
31. Scituate School Comm. v. Robert B., 620 F. Supp. 1224 (D.R.I. 1985).
32. *In re* John K., 216 Cal. Rptr. 557 (Cal. Ct. App. 1985).
33. *See* discussion under State Law Requirements in this chapter.

residential placement was required to provide a handicapped student with the "best" opportunity for educational success.[34] The district court had noted substantial evidence to support continuation of the private placement: the student regressed when he returned home for more than a week; he was unable to adjust to a less structured school environment; and communication skills could be developed better where peers used sign language.

Similarly, the First Circuit Court also invoked Massachusetts law for determining an appropriate education for a handicapped child.[35] Private placement was warranted in this case "to assure the maximum possible development of a child with special needs."[36]

A District of Columbia case illustrates the level of documentation and testing required to substantiate a claim for residential placement.[37] The court found the parent's claim in this instance to be supported by a preponderance of the evidence that included, among other things, testimony by experts familiar with the student's condition over a period of years, the student's documented need for a structured twenty-four hour program, and the child's record of progress in a residential setting. The school district, on the other hand, produced witnesses that had only reviewed the student's written records and lacked personal knowledge of his condition. Furthermore, the school review committee did not identify criteria for considering, or reasons for rejecting, the requested placement.

A request for a preliminary injunction to pay for interim maintenance in a private facility was deferred pending further proceedings in a New York case.[38] Although parents did not exhaust administrative procedures, the federal district court held that an injunction could be issued if adequate evidence were presented to demonstrate both irreparable harm and the probability of success on the issue of the state's obligation to fund the interim placement.

Finally, private residential placements continue to generate litigation regarding the payment of medical and custodial expenses. In general, courts have held that where educational needs necessitate residential placement a school district or state must cover all costs. The Seventh Circuit Court of Appeals reviewed an Illinois law that requires parents on the basis of their incomes to contribute up to $100

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34. Geis v. Board of Educ. of Parsippany-Troy Hills, 774 F.2d 575 (3d Cir. 1985).
35. David D. v Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985).
36. *Id.* at 423.
37. Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985).
38. Antkowiak by Antkowiak v. Ambach, 621 F. Supp. 975 (W.D.N.Y. 1985).

a month for living expenses if students are placed in a private facility because of a developmental disability rather than special educational needs.[39] Under state law, developmental disability is defined as "a disability which is attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b) any other condition which results in impairment similar to that caused by mental retardation and which requires services similar to those required by mentally retarded persons."[40] The appellate court noted that living expenses are implied in EHA's authorization of institutional placements and are specifically required in the Act's regulations. In this instance, the court concluded that the state had carved out a class of handicapped children and denied them entitlement to full reimbursement under the Act. In declining to draw a distinction between developmental disability and mental retardation, the court noted that the state used the same terms to define developmental disability as were used in federal regulations to define mental retardation. While the court affirmed the district court's permanent injunction against the state and order of payment of outstanding bills, it reversed the order to reimburse parents for earlier payments. The only payments viewed as justified were those necessary to ensure that the students would not be expelled from their placements.

RELATED SERVICES

A free appropriate education includes special education and related services. Under EHA, related services are services "required to assist a handicapped child to benefit from special education."[41] Related services were interpreted by a Tennessee federal district court to include neurological and psychological evaluation.[42] A handicapped child with a seizure disorder, visual difficulty, and learning disability was referred by a multidisciplinary evaluation team to a pediatrician for a medical evaluation. The physician then referred the child for neurological and psychological evaluation. The school system subsequently refused to reimburse the parents for the additional evaluations but after a hearing was ordered to pay the difference between the costs and the parents' insurance coverage. Upon judicial review, the district court found that the student's medical needs were inter-

39. Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985).
40. *Id.* at 1400.
41. 20 U.S.C. § 1401(17).
42. Seals v. Loftis, 614 F. Supp. 302 (E.D. Tenn. 1985).

twined with his educational needs thereby justifying the additional tests. Since the evaluations were requested (absent clear instructions from the evaluation team), the parents could not be required to use their own insurance coverage where payment would reduce the available lifetime benefits.

DISCIPLINE

Two cases addressed requests for preliminary injunctions to return disruptive students to their public school placements. A Georgia case involved suspension of a handicapped student suffering from a psychosexual disorder.[43] The district court denied the request to return the child to his current placement pending the outcome of the administrative review proceedings.[44] The Fifth Circuit Court affirmed this decision, noting school officials' discretionary authority to remove children who pose a threat to school safety.[45] An Ohio federal district court, however, granted two severely behaviorally handicapped students' request for an injunction.[46] The students, involved in separate incidents, were removed from the classroom and provided instruction by tutors. The court found the program modification without parental consent to be a change of placement in violation of EHA procedures. While the court acknowledged that normal disciplinary procedures for dealing with children who pose a threat to safety could be invoked for emergency removal, it found that prolonged home instruction was not the normal procedure of the district. In issuing the preliminary injunction, the court found that the benefits of returning the students to the classroom outweighed the board's concern that similar outbursts would occur again.

The Fourth Circuit Court of Appeals in 1985 joined the Fifth and Sixth Circuits in holding that expulsion of a handicapped child is a change in educational placement requiring the procedural protection of section 1415.[47] The court stated that, "[i]t would seem indeed ironic for Congress to have provided extensive procedural protection when what may be relatively minor changes are made in a child's IEP, yet not have intended such procedures to be followed when education serv-

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43. *See* discussion under Placement During Due Process Proceedings, *supra* p. 124.

44. Jackson v. Franklin County School Bd., 606 F. Supp. 152 (S.D. Miss. 1985).

45. Jackson v. Franklin County School Bd., 765 F.2d 535 (5th Cir. 1985).

46. Lamont X v. Quisenberry, 606 F. Supp. 809 (S.D. Ohio 1984).

47. School Bd. of Prince Williams County, Va. v. Malone, 762 F.2d 1210 (4th Cir. 1985).

ices for that child are terminated altogether."[48] In this case, a learning disabled child was expelled for serving as a go-between in the distribution of drugs. The school board argued that procedural review is required only if a child is in an inappropriate placement. Rejecting this argument, the court concluded that the key determinant is not appropriateness of placement, but whether the misbehavior was caused by the child's handicap. The appellate court agreed with the district court and the hearing officers that drug dealing was linked to the child's learning disability. He suffered from a loss of self image and need for peer approval, was susceptible to peer pressure, and was unable to understand the long term consequences of his actions. The court did state that misbehavior unrelated to a child's handicap could result in expulsion, but declined to discuss whether some level of educational services must be continued.

REMEDIES

Damages

Absent exceptional circumstances, courts have generally agreed that damages are unavailable under EHA. The Supreme Court in *Burlington* drew a sharp distinction between awarding damages and requiring tuition reimbursement; the latter is simply recovery of justified costs incurred by parents.[49]

The New Jersey Federal District Court, finding no exceptional circumstances, held that damages could not be recovered.[50] The board's proposed program did not pose a danger to the handicapped child, and there was no evidence that the board acted in bad faith. While minor procedural failings existed in the evaluation of the child, they were not viewed as being so egregious that they would justify damages. Only violations that go to the very essence of the procedures mandated by the EHA (e.g., the right to a full and fair due process hearing) would warrant such an award.[51]

Attorney Fees

In *Smith v. Robinson*, the Supreme Court interpreted EHA as the

48. *Id.* at 1215.
49. Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996 (1985).
50. Bonadonna v. Cooperman, 619 F. Supp. 401 (D.N.J. 1985).
51. *Id.* at 417 n.4.

exclusive means for enforcing handicapped children's comprehensive rights to a free appropriate education; parents cannot allege violations under either section 1983 or section 504 to enlarge available remedies, such as attorney fees.[52] The Court, however, implied that fees might be awarded where the EHA is not available (plaintiff is denied procedural due process) or where rights guaranteed by the Rehabilitation Act are not available under the EHA. These avenues provided the basis for continued legal challenges seeking fee awards.

The Eleventh Circuit Court of Appeals reviewed a claim for fees and other costs under both section 1983 and section 504.[53] The parents in this case had removed their daughter from a public school placement to a residential facility after the board failed to provide an educational placement hearing within forty-five days of their request. The court readily dismissed the section 504 claim, noting that the parents alleged only that their child was denied an impartial hearing not that she was "excluded from participation in, denied the benefits of, or subjected to discrimination under a program receiving federal financial assistance."[54]

In assessing the section 1983 claim, the appellate court relied upon the Supreme Court's distinction in *Smith v. Robinson* between substantive equal protection claims and procedural due process challenges. The Supreme Court noted in dicta that "unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme."[55] Specifically, the circuit court concluded that "where . . . the local educational agency deprives a handicapped child of due process by effectively denying that child access to the heart of the EHA administrative machinery, the impartial due process hearing, an action may be brought under [section] 1983."[56] This ruling is consistent with several 1984 post-*Smith* decisions which held that plaintiffs could seek relief under section 1983 when they used courts to enforce guaranteed due process rights.[57]

The Massachusetts Supreme Court found a due process violation justifying the award of attorney fees under section 1983.[58] In an earlier decision, the court had held that terminating special education

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52. 104 S. Ct. 3457 (1984). *See* The Yearbook of School Law 1985 at 86.
53. Manecke v. School Bd. of Pinellas County, Fla., 762 F.2d 912 (11th Cir. 1985).
54. *Id.* at 922.
55. Smith v. Robinson, 104 S. Ct. 3457, 3471 n.17 (1984).
56. Manecke at 919.
57. *See* The Yearbook of School Law 1985 at 87-88.
58. Stock v. Massachusetts Hosp. School, 476 N.E.2d 210 (Mass. 1985).

services through the issuance of a high school diploma without prior notice and review violated state and federal laws.[59] Following this decision, the student as the prevailing party filed a request for attorney fees. The state high court held that the student's procedural rights had been abridged and that it was only through judicial action that he gained his EHA rights. The school has asked the United States Supreme Court to review the decision.

Similar decisions also were rendered by several federal district courts. A New York court awarded fees based on a school district's denial of a hearing to determine a student's needs and its later refusal to provide services ordered by the commissioner of education.[60] Section 1983 was invoked by the district court to fill what it perceived to be two gaps in the EHA. According to the court, the federal law does not provide a remedy to aggrieved parties prior to an administrative decision; and relief under EHA is limited to parties aggrieved at the administrative level. The Connecticut Federal District Court also awarded attorney fees, finding a change in placement through expulsion from school to constitute a *Smith* procedural exception.[61]

The District of Columbia District Court denied attorney fees under section 1983 and section 504, but invoked the "American Rule" and awarded fees because the school system had acted in bad faith.[62] Bad faith was evidenced by actions such as (1) commending the mother for her assistance in the placement process one day, and then initiating due process proceedings the next day because the mother refused to cooperate, and (2) the district's persistence in pursuing administrative hearings with little evidence to support its position.

In contrast to the above cases, several other courts found that plaintiffs did not establish independent due process or section 504 violations. These courts closely examined claims of parents and students to determine if additional statutory rights existed or if their claims were interwoven with rights guaranteed by the EHA. The Second Circuit Court of Appeals held that New York parents' efforts to ensure continuation of their children's placement in learning disabilities programs operated by Boards of Cooperative Education Services (BOCES) were within the bounds of the EHA.[63] Finding that the parents did not establish entitlement to additional procedural rights, the

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59. Stock v. Massachusetts Hosp. School, 467 N.E.2d 448 (Mass. 1984). *See* The Yearbook of School Law 1985 at 82.

60. Blazejewski v. Board of Educ. of Allegany Cent. School, 599 F. Supp. 975 (W.D.N.Y. 1985).

61. Stuart v. Nappi, 610 F. Supp. 90 (D. Conn. 1985).

62. Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985).

63. Bonar v. Ambach, 771 F.2d 14 (2d Cir. 1985).

appellate court reversed a lower court's award of attorney fees and, at the same time, remanded the case to determine if fees should be awarded to the state commissioner of education. The dispute in this case arose when the state notified BOCES that funding would be discontinued for learning disabled children beginning with the 1980-81 school year. While the parents were seeking an injunction against termination of funding, the state amended its funding law to allow aid to BOCES. The parents, however, continued their lawsuit by requesting class certification to ensure that nondefendant school districts notify parents of this policy change before altering placements of learning disabled students. On remand to consider an award of attorney fees for the state, the district court was instructed to determine if the parents' claim was "frivolous, unreasonable, or groundless, or [whether] the plaintiff[s] continued to litigate after it clearly became so."[64] The standard imposed for assessing fee awards was outlined by the Supreme Court for title VII cases, but has been applied by the Second Circuit in evaluating fee claims under section 1983.

In a New Jersey case in which attorney fees were denied, the federal district court reasoned that parents who had successfully challenged a district's proposed IEP for their child could not prove a due process violation when they had used the EHA administrative process three times.[65] The District of Columbia Court of Appeals simply vacated an award of fees in light of *Smith v. Robinson*.[66] In 1984, the Sixth Circuit Court in denying fees under *Smith* concluded that parents could not circumvent the procedural requirements of the EHA by raising section 1983 claims. The Supreme Court denied *certiorari* in 1985.[67]

Litigation continued in 1985 against the Special School District of St. Louis County, Missouri.[68] After remand from the Eighth Circuit in 1984, the district court allowed the parents to file an amended complaint for damages under the Rehabilitation Act. The 1985 amended complaint alleged "discriminatory deprivation of plaintiff's right to education" under the Rehabilitation Act. The court rejected the parents' argument that the *Smith* restrictions were inapplicable to the case because the action was commenced eight months prior to the ef-

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64. *Id.* at 20, quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

65. Bonadanna v. Cooperman, 619 F. Supp. 401 (D.N.J. 1985).

66. McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985).

67. Austin v. Brown Local School Dist., 746 F.2d 1161 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985).

68. Miener v. Special School Dist. of St. Louis County, Mo., 607 F. Supp. 1425 (E.D. Mo. 1985). *See* The Yearbook of School Law 1985 at 89.

fective date of the EHA, as amended in 1975 by P.L. 94-142. The court noted that once available the parents had used the laws administrative machinery to enforce their claims. Based on *Smith*, the court posed two questions: (1) Does section 504 guarantee rights greater than those provided by EHA? and (2) Did the school district provide services beyond those required by EHA and discriminatorily deny those services to the child? Responding to the first question, the court found that the alleged discrimination resulting from the district's failure to develop the necessary programs for the child was not only addressed by federal statute, but that the EHA provided "a more precise remedy than the Rehabilitation Act."[69] As to the second question, the parents could not rely on their original argument that the EHA did not exist. Furthermore, in dismissing the complaint the court noted that all services provided exceeded those required by law.

While prospects for acquiring attorney fees under federal laws are limited, successful plaintiffs may be entitled to fees under state laws. A California appellate court awarded fees under California Government Code (section 800) that authorizes costs where "the award, finding, or other determination of such proceedings was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his official capacity."[70] The court found the school district's prolonged failure to reassess a clearly inappropriate placement of the handicapped child to constitute arbitrary and capricious behavior.

Elimination of possible awards of attorney fees under the EHA remains controversial. Because this aspect of litigation is costly,[71] it is feared that the lack of fees may impede enforcement of the rights of handicapped children. In 1985, bills to authorize courts to award attorney fees to successful litigants passed both the House and Senate, but there was no agreement on a single law.

ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." Through an extensive line of Supreme Court rulings, the con-

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69. *Id.* at 1430.

70. *In re* John K., 216 Cal. Rptr. 557 (Cal. Ct. App. 1985).

71. In Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3457 (1984), the legal suit addressing catheterization, attorney fees were almost $200,000. *School Law News*, May 31, 1985, at 3.

cept of state sovereign immunity has been constitutionalized. While restricting suits against states, the Court also has recognized that individuals can seek prospective injunctive relief when a state's actions are contrary to protected constitutional rights—"supreme authority of the United States."[72] Recent eleventh amendment decisions of the Court have raised perplexing questions related to the enforcement of handicapped laws.

In 1984 in *Pennhurst State School and Hospital v. Halderman*, the court ruled that pendant claims under state law were barred by the eleventh amendment.[73] Specifically, the Court held that:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the [e]leventh [a]mendment.[74]

This ruling was followed by the Court's pronouncement in 1985 in *Atascadero State Hospital v. Scanlon* that the Rehabilitation Act of 1973 does not abrogate states' immunity to suits in federal court.[75]

For federal courts to have jurisdiction, the Court proclaimed that "Congress must express its intention to abrogate the eleventh amendment in unmistakable language in the statute itself."[76] This requirement is more restrictive than earlier rulings requiring a clear showing of congressional intent. The Rehabilitation Act specifies that "remedies . . . shall be available to any person aggrieved by an act or failure to act *by any recipient* of [f]ederal assistance" (emphasis added).[77] While acknowledging the state as a recipient of aid, the Court continued by holding that this general authorization language was not "unequivocal language" sufficient to abrogate immunity. According to the Court, "when Congress chooses to subject the states to federal jurisdiction, it must do so specifically."[78] Furthermore, the

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72. *Ex parte* Young, 209 U.S. 123 (1908). *See also* Edelman v. Jordan, 415 U.S. 651 (1974).
73. 465 U.S. 89 (1984).
74. *Id.* at 106.
75. 105 S. Ct. 3142 (1985).
76. *Id.* at 3148
77. 42 U.S.C. § 2000d *et seq.*
78. Atascadero at 3149.

Court held that participation in the program and receipt of federal funds did not waive the state's immunity.

Courts in the wake of these decisions have addressed (1) whether under *Pennhurst* federal courts can require compliance with state substantive handicap standards that exceed federal requirements, and (2) whether EHA abrogates immunity under the standard advanced in *Atascadero*. Federal appellate courts reviewing enforcement of state claims avoided *Pennhurst* strictures by concluding that federal language and legislative history of EHA "intertwined federal and state standards into one body of law."[79] The First Circuit Court of Appeals noted that "Congress explicitly defined a free appropriate education as an education which 'meets the standards of the [s]tate education agency' and expressly authorized review of the question whether the education actually provided (or proposed) met these standards."[80] The Third Circuit Court of Appeals pointed out the incongruity of Congress allowing the forum for review to determine the level of a child's education.[81] If the enforcement of federal courts was limited, school systems could simply avoid higher state standards by removing cases to federal courts.

The First Circuit Court of Appeals presented the first indepth analysis of whether Congress abrogated states' eleventh amendment immunity with the enactment of EHA.[82] In concluding that Congress did effectively abrogate states' immunity, the appellate court relied upon EHA's firm grounding on the equal protection clause of the fourteenth amendment, a recognized limitation on states' immunity. Unlike the Rehabilitation Act, explicit statutory language of the EHA speaks to assuring handicapped children equal protection of the law. This has been reinforced by the Supreme Court, most notably in *Smith v. Robinson* where the Court declared that EHA was the exclusive avenue for enforcing handicapped children's rights to "a free appropriate education as guaranteed by the [e]qual [p]rotection [c]lause."[83] Additional evidence of congressional intent used by the court to support abrogation of immunity included the remedies for violating EHA; they are directed not at "any recipient of federal aid,"

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79. David D. v. Dartmouth School Comm., 775 F.2d 411, 419 (1st Cir. 1985). *Accord* Geis v. Board of Educ. of Parsippany-Troy Hills, 774 F.2d 575 (3d Cir. 1985); Students of Cal. School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), *vacated on other grounds*, 105 S. Ct. 1820 (1985).

80. *Id.* at 420.

81. Geis v. Board of Educ. of Parsippany-Troy Hills, 774 F.2d 575 (3d Cir. 1985).

82. David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985).

83. *Id.* at 421, quoting Smith v. Robinson, 104 S. Ct. 3457, 3468 (1984).

as in the Rehabilitation Act, but designate "states and their political subdivisions responsible for providing public education."

One state court also addressed the issue of eleventh amendment immunity in 1985. The federal district court of New Hampshire certified questions to the state supreme court regarding waiver of state immunity to claims under P.L. 94-142 and the state special education law.[84] Finding no express statutory language waiving immunity, or waiver by implication, the court reasoned that the state had not consented to suits in federal court. The court, however, reaffirmed an earlier interpretation that the state's participation in the federal program did subject boards of education to federal review.

STATE LAWS

Following the Supreme Court's decision in *Pennhurst* uncertainty has existed as to whether state standards exceeding EHA requirements can be enforced in federal courts. As noted in the discussion of eleventh amendment immunity, most courts have resolved this issue by interpreting EHA as incorporating state requirements. Stricter state standards upheld under this analysis included Massachusetts' state judicially interpreted requirement that special education programs assure the "maximum possible development" of a child;[85] New Jersey's requirement that handicapped students be provided a program "according to how the pupil can best achieve success in learning";[86] and California's standards for seismic safety of schools.[87]

Although the Rhode Island handicap statute specifies that a school system "shall provide such type of special education that will best satisfy the needs of the handicapped child," the federal district court found that this did not impose a higher standard than the EHA.[88] With the state regulations paralleling the federal standards and state court decisions implying that the state law conformed to federal requirements, the court was unable to conclude that the legislature envisioned a greater right.

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84. John H. v. Brunnelle, 500 A.2d 350 (N.H. 1985).

85. David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985).

86. Geis v. Board of Educ. of Parsippany-Troy Hills, 774 F.2d 575, 582 (3d Cir. 1985).

87. Students of Cal. School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), *vacated on other grounds*, 105 S. Ct. 1820 (1985).

88. Scituate School Comm. v. Robert B., 620 F. Supp. 1224, 1233 (D.R.I. 1985).

While in some instances state laws may expand guaranteed rights of handicapped students, they cannot impermissibly narrow federal requirements. The Superior Court of New Jersey found that the state's definition of a pre-school handicap as "a condition which seriously impairs a child's functioning and which has a high predictability of seriously impairing normal education development" was inconsistent with the EHA.[89] According to federal law, programs must be developed for all handicapped children regardless of the severity of their handicap. Additionally, a provision providing for the termination of services when "sufficient written documentation is presented" was held to violate the EHA's detailed procedural safeguards required for a change in educational placement.

Where a state law clearly provided greater procedural protection than the EHA, however, the Rhode Island Supreme Court held that the federal minimum requirements did not pre-empt state rights.[90] The Rhode Island statute affords parents a three-level review process, while the EHA requires only two. As the court reasoned, "[c]ertainly the federal act never anticipated that handicapped children would be denied the rights enjoyed by nonhandicapped children under state law."[91]

In the absence of EHA's own statute of limitations, the Second Circuit applied a four-month state statutory limitation rather than a three-year state limitation requested by parents.[92] The court found that the shorter review process more closely fulfilled the EHA policy of ensuring prompt review and appropriate placement of children.

In a Tenth Circuit Court of Appeals case, a school system asserted that under state law students were entitled only to twelve years of free public education.[93] An examination of the district's practice, however, revealed that only handicapped students were limited to twelve years; nonhandicapped students who failed a grade were permitted by district policy and state law to repeat the grade and thus routinely received more years of instruction. In this case, the court held that the child's records revealed that she was completing the tenth grade, not the twelfth, and that she must be provided two additional years of school. An education program that required only the passage of time was found to be inappropriate.

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89. *In re* N.J.A.C., 497 A.2d 1272, 1274 (N.J. Super. 1985).
90. *In re* Michael C., 487 A.2d 495 (R.I. 1985).
91. *Id.* at 497.
92. Adler v. Education Dep't of State of N. Y., 760 F.2d 454 (2d Cir. 1985).
93. Helms v. Independent School Dist. No. 3, 750 F.2d 820 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2024 (1985).

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

The Rehabilitation Act, section 504, provides that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . ."[94] Section 504 is broader than the EHA and applies to educational and non-educational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

The Ninth Circuit Court of Appeals reversed a district court decision and awarded damages and attorney fees to an applicant denied admission to a school of nursing because of Crohn's disease. On the second appeal before the circuit court, it was determined that the student was an "otherwise qualified handicapped individual" and that the school had denied admission based on the assumption that she could not compete because of her illness. The court stated that, "[i]t is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid."[95] However, the appellate decision was reversed by the Supreme Court in a summary disposition. No rationale was provided.[96]

After *Smith v. Robinson*, section 504 cases have been restricted if the same rights are available under the EHA.[97] If services beyond those required by the EHA are provided by the state in a discriminatory manner, however, relief can be sought under section 504. A New York federal district court held that the payment of lower salaries to teachers in state supported institutions for the deaf and blind stated such a claim.[98] Assuming that the state provides teacher services beyond the EHA to public schools, the court reasoned that payment of salaries lower than those paid in public schools could result in a dis-

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94. 20 U.S.C. § 794.

95. Kling v. County of Los Angeles, 769 F.2d 532,534 (9th Cir. 1985).

96. *Kling*, 106 S. Ct. 300 (1985).

97. 104 S. Ct. 3457 (1984). Cases where section 504 was held to be inapplicable because relief was available under EHA are discussed in other sections.

98. Council for the Hearing Impaired v. Ambach, 610 F. Supp. 1051 (E.D.N.Y. 1985).

criminatory denial of services to the students. Summary motion was denied to enable the plaintiffs to develop the factual basis to support their claim.

Employees

The Eleventh Circuit Court of Appeals addressed whether a contagious disease is a "handicap" within the meaning of section 504 of the Rehabilitation Act.[99] Relying upon the language of the statute and its regulations, the court concluded that chronic contagious diseases constitute an impairment under section 504. Specifically, the court noted that an individual with tuberculosis "has a physical or mental impairment which substantially limits . . . major life activities," and, as in this case, had "a record of such an impairment" and was regarded by her employer as "having such an impairment."[100] Since the disability fell squarely within the statutory and regulatory framework and clearly promoted congressional intent, the court found no basis for an exemption. Moreover, the court expressed reluctance without legislative direction in granting an exception that would release employers from the duty of even considering whether reasonable accommodation could be made for individuals suffering from contagious diseases. Since no consideration was given by the district court as to whether the teacher was "otherwise qualified" to teach, the case was remanded to determine if the risk of infection precluded her from teaching and, if so, whether reasonable accommodation could be made by assigning her to another position.

The Eighth Circuit Court of Appeals examined the allocation of the burdens of proof and persuasion in a section 504 suit.[101] In this case, a visually handicapped librarian claimed she was denied employment in a school system because of her handicap. She argued at the appellate level that the district court had improperly required her to show discriminatory intent and had failed to require the school board to prove its stated nondiscriminatory reason for rejection by a preponderance of evidence. In confirming the district court decision, the appellate court found that the plaintiff was not required to prove discriminatory intent, but merely to show intent in order to establish a prima facie case of discrimination. Since the board had denied basing its decision on her handicap, this burden was viewed as proper. The

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99. Arline v. School Bd. of Nassau County, 772 F.2d 759 (11th Cir. 1985).
100. *Id.* at 764, citing 29 U.S.C. § 706(7)(B), 45 U.S.C. § 84.3(j)(2) § 84.4(j)(2).
101. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

burden of persuasion as to whether the handicap was the sole reason for rejection was held to remain with the plaintiff; the board was required only to show a nondiscriminatory reason for its decision.

The Supreme Court rendered a far reaching decision regarding jurisdiction of federal courts in section 504 suits.[102] As noted earlier, the Court held that there was no clear congressional intent in the language of the Rehabilitation Act to abrogate states' eleventh amendment immunity. Unless a state specifically waives its sovereign immunity, section 504 suits cannot be filed in federal courts. Handicapped persons, however, still have the option of challenging discriminatory practices in state courts under state laws. In most states, school districts are still subject to suits because they are not viewed as an arm of the state possessing eleventh amendment immunity.[103]

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102. Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985). *See* discussion under Attorney Fees in this chapter.

103. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977). *But see* Martinez v. Board of Educ. of Taos Mun. School Dist., 748 F.2d 1393 (10th Cir. 1985).